NO. 22488

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MILO GILBERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

EDWARD J. SKELLY

11044 McCormick Street
North Hollywood, California

Attorney for Appellant

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JURISDICTION

This action is appealed pursuant to Rule 35 of Federal Court Rules of Criminal Procedure which rule, in part, states "The Court may correct an illegal sentence at any time . . . "

The motion under Rule 35 is complimentary to a motion under 28 U. S. C. 2255, however, where there is alleged illegality in the sentence as opposed to illegality in the conviction upon which the sentence rests. Rule 35 is the applicable procedure.

Robbins v. United States (9th Cir. 1965),

345 F. 2d 930, 933;

United States v. Machibroda (6th Cir. 1964),

338 F. 2d 947, 949;

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Redfield v. United States (9th Cir. 1963),

315 F. 2d 76, 80-1;

Wilson v. United States (10th Cir. 1962),

310 F. 2d 879.

Such a motion is, of course, concededly one to be determined strictly on the record as it exists at the time of the motion, and therefore defendant has confined himself to matters appearing of judicial record.

Gilinsky v. United States, supra, 335 F. 2d at 916.

STATEMENT OF THE CASE

Defendant and appellant herein was originally charged in a 35 count indictment charging tax fraud.

Defendant below was convicted on 31 counts of the original indictment and acquitted on 4. The Ninth Circuit Court reversed 29 of the 31 convictions, following which the Supreme Court reversed the remaining 2.

Gilbert v. United States, 370 U.S. 650,

8 L. Ed. 2d 750, 82 S. Ct. 1399;

C. F. Gilbert v. United States (9th Cir. 1961),

291 F. 2d 586.

The Court record discloses that on each of the 31 count convictions a sentence was imposed of one year and a day.

Defendant, thereafter, was retried on the original charges (counts) as set forth above, many of which counts were dismissed either before or during trial.

The defendant below was acquitted on four counts and convicted on 12 counts of violation of Title 26 U. S. C. §7606(2), all of which individual counts were included within the issues of the original trial as identical counts, and which counts were reversed by the 9th Circuit Court or the United States Supreme Court.

Thereafter, when the trial court imposed sentence after the second trial, the court increased the original sentences (which were reversed by the 9th Circuit and the Supreme Court) from one year and a day to three years and five years respectively, but with each sentence to run concurrently as opposed to the original sentences which were to run consecutively.

Appeal was denied (Gilbert v. United States, 359 F. 2d 235; Certiorari denied 385 U. S. 82).

Defendant is now incarcerated in Federal Prison serving the sentences as set forth above.

Prior to this appeal defendant below petitioned the District Court pursuant to Rule 35 of the rules of Federal Crime Procedure to correct an illegal sentence. This motion was denied.

Thereafter, defendant, on November 13, 1967, moved the trial court for bail pending appeal of the denial of the court to correct the illegal sentence, and for permission to proceed in

forma pauperis. The matter of bail pending appeal was considered by the District Court, the Honorable Charles Carr presiding. Bail was denied on the grounds that no substantial question of law was presented by defendant, and that the sentences imposed were legal. The court further held that the attempted motion to correct the sentence was frivolous.

SPECIFICATION OF ERROR

Whether a trial court can impose greater sentences on individual counts upon retrial than the same court imposed on identical counts after conviction in the first trial.

Defendant below is attempting to correct the sentences imposed in the second trial to 1 year and a day which was the sentence originally imposed on the same counts.

That each sentence for each separate offense must be treated as a separate entity and, therefore, in this case, sentence on each count which exceeds 1 year and a day is illegal. This, it is contended, entitles defendant below to a correction of his sentence on each count to a year and a day since the sentences are being served concurrently that makes a total period imprisonment of one year and a day. Defendant has served this amount of time and therefore alleges he is entitled to release.

It is submitted that it is settled law that in correcting a sentence the court may not alter it so that the sentence is to be served consecutively instead of concurrently, even for the purpose of bringing the sentence into accord with the trial judge's intention.

United States v. Adams (6th Cir. 1966),

362 F. 2d 210-211.

Lastly, whether a more severe sentence may be imposed in a conviction after retrial than was imposed after the original trial on individual counts.

ARGUMENT

This motion presents an apparently simple question, but one which (so far as defendant can ascertain) has not been previously litigated on appeal:

> Whether a defendant sentenced separately on a multi-count indictment to several consecutive sentences of a year and a day on each, and who successfully obtains reversal of those convictions (primarily on constitutional grounds), and who on retrial is acquitted of many of the charges, has some dismissed, but is convicted of some of the counts involved in the original conviction, may incur a longer sentence (either three years or five years each) on each of the second-conviction counts, merely because those longer sentences are to be served concurrently."

It is submitted that, despite the apparent first-impression nature of that question, when the component parts of the issue are broken down and examined under pertinent authority, the answer is clear:

Each sentence for each offense must be treated as a

separate entity for this purpose and, therefore, that portion of the sentence on each count which exceeds a year and a day is illegal.

CLARIFICATION: THAT WHICH DEFENDANT IS NOT URGING.

It is sometimes appropriate, particularly in a relatively novel case, to clarify certain matters which are not urged.

Defendant is not contending that either the first trial court or the second trial court lacked initial discretion to determine what period of imprisonment would be appropriate punishment for the offenses of which defendant was convicted. He does contend, however, that, as to each offense, that discretion could not be exercised in a manner which had the result of imposing a more severe sentence for that conviction on the second trial than the sentence imposed on that conviction at the end of the first trial.

Similarly, defendant does not contend that the District Courts are without jurisdiction to elect between concurrent and consecutive sentences initially. He does contend that the concurrent or consecutive serving of the sentence is immaterial to this issue and that each separate criminal conviction must be viewed as a single, separate entity in determining whether a more severe sentence has been imposed in the second trial, following a successful appeal from the first sentence.

" 'Sentencing' is not a 'game in which a wrong move by the judge means immunity for the prisoner.' "

McDowell v. Swope (9th Cir. 1950), 183 F. 2d 856,

859 [5] (emphasis added).

As the Ninth Circuit there held, there is no immunity, but only a right to have the sentence reduced to that which could lawfully have been imposed, and to finish serving that lawfully-imposed sentence.

Ibid;

Cf., Robbins v. United States, supra, 345 F. 2d at 933.

As the Fifth Circuit has phrased it, even though a sentence must be reduced under Rule 35 "under no stretch of the imagination does this affect the conviction or anything other than the sentence."

Benson v. United States (5th Cir. 1964), 332 F. 2d 288, 289;

Cf., United States v. Lynch (7th Cir. 1947), 159 F. 2d 198, 199 [1 and 2].

Only the portion in excess of that legally permissible is subject to attack.

Browning v. Crouse (10th Cir. 1966), 356 F. 2d 178, 180.

Here, then, defendant is asserting no claims concerning that portion of the present sentence on those counts which is the same as the sentence originally imposed, i. e., a year and a day. He alleges he has served that period and therefore he is entitled to release. He seeks an order correcting the sentence by reducing it to one year and a day as to each offense.

The question, then, is simplified down to: Whether the court, in the second trial, was empowered to sentence defendant to three-year or five-year terms for the self-same offenses on which a year and a day sentence had been imposed in the first trial. The answer is clearly that the court could not.

Manifestly, three years is longer than one year. It is now settled beyond argument that, at least in the federal courts,[1/] a defendant who successfully obtains appellate reversal of a first conviction and sentence (by direct attack on appeal) cannot be subjected to a greater penalty in the event of a second conviction on retrial of the same charge. See United States v. Hough, 157 F. Supp. 771.

In the landmark decision in this field, the Supreme Court has held constitutionally intolerable that which a sense of natural justice also finds abhorrent: conditioning a defendant's right to appellate review upon the gamesmanlike hazard of being more severely punished if he succeeds on appeal.

> Green v. United States (1957), 355 U. S. 184, 187-192.

In the language of the Eighth Circuit, in the course of a holding that the first punishment -- "lenient as it was" -- nevertheless fixes the maximum limit of any subsequent punishment:

> "The law may not now ambush with the threat of

1/ And generally speaking in virtually all other jurisdictions (if not actually all other jurisdictions). See, for example, People v. Henderson, 60 Cal. 2d 482, 495-7, 35 Cal. Rptr. 77, 386 P. 2d 677, and authorities discussed.

repeated punishment the person who attempts to claim his constitutionally protected rights [citation]. To condone such a procedure would be to allow a prosecutor to unconstitutionally 'boobytrap' a constitutionally guaranteed right [citation; in the language of Mr. Justice Holmes] 'It cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights . . .' "

Oksanen v. United States (8th Cir. 1966), 362 F. 2d 74, 81, cert. den. 385 U.S. 840.

Neither, it seems clear, may the law ambush defendant by inflicting additional punishment because he attempted -- successfully -- to claim his constitutionally protected rights in the first appeal; that appears to be at least an equally abhorrent "boobytrap".

In that which is probably one of the two or three leading cases in this area, the Second Circuit has termed as "a well settled general rule" the proposition that the sentence once regularly imposed cannot subsequently be increased, doing so in the context of a multiple-count situation. Where there were two counts and the defendant was sentenced on both, and one of the sentences was subsequently set aside, the other could not be increased even though -- as in the case at bar -- the maximum permissible sentence was greater than that imposed by the court on the one count (and, for that matter, greater even than both original sentences). In other words, the single sentence on the single count, once imposed could not be increased -- without reference to any other

counts, nor with reference to the permissible statutory maximum, nor even with reference to the District Court's intent.

United States v. Sacco (2nd Cir. 1966),

376 F. 2d 368, 369.

As the Ninth Circuit has recently pointed out -- in the course of reversing an order denying correction of sentence -- the fact that the District Court might have imposed greater or consecutive sentences does not mean that the matter "may be treated as though he had done so."

Kennedy v. United States (9th Cir. 1964),

330 F. 2d 26, 28-9 and numerous authorities collected.

THE MULTIPLICITY OF COUNTS DOES NOT AFFECT THE RESULT.

Based upon the foregoing, defendant submits, it seems crystal clear that a defendant originally sentenced to a year and a day cannot, following retrial after a successful appeal, be sentenced to either three years or five years imprisonment -- notwithstanding the maximum which might have been imposed at either trial, and notwithstanding the subjective intent of either the first or the second court. That, it seems, approaches being the end of the matter unless the fact that both the first and the second sentences imposed punishment on multiple counts.

In this section, as in the authorities collected at the end of the preceding section, the possibility of such a qualification will be

examined and it will be seen that the multiplicity of counts does not constitute a justification for departing from the general rule. Phrased simply: Each sentence for each crime must be treated as a single entity or a single unit.

If nothing else, that constitutes the law of the case. In its decision on the second appeal, the Ninth Circuit examined this very defendant's thesis that the separate charges were not taken independently but were rather tried " 'as a whole, as a gestalt' ", and rejected this contention, holding that this Court properly treated each count as an independent entity.

Gilbert v. United States (9th Cir. 1966), 359 F. 2d 285, 288, cert. den. 385 U. S. 882.

That holding, of course, is not only binding upon this Court, but also constitutes the law of the case for the purpose of all courts.

Furthermore, there is contained within the four corners of this case the clearest example of the necessity of such a rule against subsequent increase in punishment. On the second appeal, the Ninth Circuit noted that this defendant had been convicted on three counts of violating 18 U. S. C. §1001.

359 F. 2d at 286.

It held that, since those convictions were supported, the validity of the remaining convictions would not be examined.

359 F. 2d at 288-9 [10].

Let us examine that. In the first trial, this defendant was sentenced to a year and a day on each of those three counts of violating §1001: A total of 3 years and 3 days. But in the second

trial, that punishment on any one of those three counts was increased to five years.

In other words, when Mr Gilbert suffered a first conviction of violating §1001, the proper punishment was three years, but, because the federal authorities acted unconstitutionally in searching and seizing his property and the judgment was reversed, his punishment should be increased forty percent! 2/

One may readily hypothesize that the Ninth Circuit, on the second appeal, would have reached the same judgment if only one of the §1001 counts resulted in a valid conviction, since the punishment for that one would still have been five years. Thus, a defendant could be found to have been validly convicted on only one of 15 charges in a second trial and yet be subjected to a 500 per cent increase in punishment over that imposed on that count in the first, unconstitutional trial. It is not difficult, defendant submits, to ascertain the reason why courts have been unwilling to suffer such a result and have, instead, flatly prohibited increased punishment and flatly demanded examination of each count as a unit.

In the benchmark Benson case (supra), the Fifth Circuit, speaking through Judge Brown, pointed out the basic necessity of examining sentences on a specific basis:

2/ And his right to meaningful appellate review of errors committed in the charges of violating 26 U.S.C. §7206 is forfeited to boot.

"A sentence is passed not because the defendant is a social outcast or needs chastisement generally. It is the law's punishment for specific transgressions of its formalized standards. It seems to us that everything points to the importance of an articulate, identifiable sentence being imposed. If that is what the law reasonably requires and prefers, then a sentence varying from that standard is, in the words of F. R. Crim. P. 35, 'illegal'."

Benson v. United States, supra, 332 F. 2d at 291. Continuing, the court there noted that rehabilitation is one of the most important functions performed by the entire criminal law and the prison system. Rehabilitation, it held, could only be efficiently carried out when there is a specific indication to the offender of "what sentence has been imposed for what conviction," and that "A clear understanding by the prisoner of the sentence imposed for the particular offense involved is most helpful in the rehabilitation process."

332 F. 2d at 292.

In another very recent and compellingly similar case, a defendant was convicted of five counts charging interstate telegraphic fraud and transportation of stolen money. He was sentenced to 10 years on count 3 of the indictment and a year on each of the four other counts, all to be served concurrently. Thereafter (by some means not disclosed in the opinion), the court's attention was called to the fact that five years was the statutory maximum

for count 3. The trial court then vacated all sentences:

> "Obviously seeking to correct the illegal sentence, while giving full effect to his originally intended ten-year total sentence, the District Judge then sentenced defendant to ten years on Count 2 [within the statutory maximum on that count] and one year on all the other counts, with all sentences to run concurrently. The effect of his action was to vacate the illegal ten-year sentence on Count 3 and reduce it to one year, and to vacate the legal sentence on Count 2 and increase it to ten years."

On appeal, the appellate court observed the propriety of reducing the sentence on count 2 but held: despite the court's initial intent, the original sentence on the other count (within the statutory bounds) could not be increased.

> "If, as appears likely from the record before us, the petitioner has now served a full year, he has completed his legal sentence and must now be discharged."

United States v. Adams (6th Cir. 1966), 362 F. 2d 210, 210-212.

In other words, the court could reduce the excessive 10-year sentence to one year, but it could not increase the previously-imposed one-year sentence to five years, or ten years, ar at all.

The Fourth Circuit has held that a sentence on multiple

counts cannot be corrected to increase the sentence originally imposed on any one count, nor can the same be achieved by converting a formerly concurrent sentence to consecutive.

United States v. Magliano (4th Cir. 1964),

336 F. 2d 817, 823 (holding that the defendant, against whom such a change was assessed, might file a motion under Rule 35 and would be entitled to have it granted, correcting the sentences downward and leaving them concurrent).

The Sixth Circuit has dealt with a case of multiple convictions attacked on motion under Rule 35, in which the district judge refused to grant the motion because the total sentence tacked together was within the maximum which could have been imposed in the first place, and therefore the defendant was not prejudiced. Held: Since multiplicity of sentences impair opportunities for pardon or parole, each must be separately examined, even apart from the question of length of sentence.

United States v. Machibroda (6th Cir. 1964),

338 F. 2d 947, 949 (reversing order of denial).

The Fifth Circuit subsequently explained its own keystone decision in Benson, (supra), in the following terms:

"[A] general sentence within the aggregate maximum for three counts but which exceeded the maximum allowable on any one count required remand for resentencing under Rule 35.'

Milam v. United States (5th Cir. 1965),

341 F 2d 956, 957, note 1.

In the case at bar, whatever "the aggregate maximum" on all of the second trial counts might be, the "maximum allowable on any one count" was a year and a day -- the amount imposed on this defendant in his first trial. Without awaiting appellate intervention, it is submitted, this Court should correct the sentence by reducing it to that allowable maximum.

Respectfully submitted,

EDWARD J. SKELLY

Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward J. Skelly

EDWARD J. SKELLY